

Legitimate Expectation of Investors in International Commercial Arbitration

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Abstract

The concept of legitimate expectations is an International Investment Law principle. The concept is not provided for directly in investment contracts or bilateral investment treaties. Arbitration tribunals consider the concept as inseparable element of fair and equitable treatment (FET) standard. The aim of legitimate expectations is to support stability and predictability of a host State policy. For investors to be treated fairly and equitably, the legitimate expectation of the investor should be proportionate to the interest and rights of host State.

1. Introduction

In the last few years, Kenya has seen establishment of many projects in the mining and energy sector. Many of these projects are run by the state in partnership with the foreign investors who have expertise in Investor-State contracts. The state has monopoly over the natural resources while the investor has control over expertise and capital. In *Walam Energy Inc. vs The Republic of Kenya*¹ and *Kinangop Windpark Ltd vs Republic of Kenya*², both investors have commenced arbitration proceedings against the Kenyan government seeking compensation amounting to billions of shillings.

In both cases, the investors have raised the issue of violation of their legitimate expectations. The nature and content of legitimate expectation in arbitration proceedings is of great importance. Legitimate expectation of an investor is a common law concept that seeks to protect foreign investors against changes of host State laws and policies.³

Legitimate expectation of investors is not an independent element in International Investment Law. However, it has been accepted as an inseparable part of Fair and Equitable Treatment (FET) standard in International Investment Law.⁴ The issues that arise in this concept relates to degree

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¹ *WalAm Energy Inc. v. Republic of Kenya* ICSID Case No. ARB/15/7 Tribunal recently constituted: June 2, 2016.

² *Kinangop Windpark Ltd vs Republic of Kenya*, ICC Case 21728/TO. However, on July 2, 2018, the International Court of Arbitration seating in London, dismissed the claim against the Government of Kenya for over Sh31 billion that had been filed by Kinangop Wind Park Limited.

³ Schreuer, Christoph and Kriebaum, Ursula. At What Time Must Legitimate Expectations Exist? In: Werner, Jacques; Ali, Arif Hyder (eds.), *A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts* [online]. CMP Publishing, 2009, p. 265-276.

⁴ Pandya, A.P. Interpretations and coherence of the fair and equitable treatment standard in investment treaty arbitration. The London School of Economics and Political Science (LSE), 2011.

of expectations and commitments imposed on host State. Legitimate expectation involves expression of protection of investors and their rights by granting them predictability of the legal environment in the host State.⁵ Does it mean that the concept limits the State right to design policy and enact legislation? In instances where States experience abrupt economic and political changes, are they at liberty to change policy in the interest of general public? Do these actions violate the concept of legitimate expectations of an investor and FET standard?

The article attempts to discuss gaps surrounding the concept of legitimate expectations in recent arbitral tribunals. Reference is made to arguments advanced in *Walam Energy* and *Kinangop Windpark* Cases. Arbitral tribunals have taken different approaches in interpreting the concept of legitimate expectation. There is conflicting opinion on whether the concept takes into account decisions of an investor prior to investment, interests, and prevailing conditions of host State.

In *Kinangop Windpark Ltd vs Republic of Kenya*,⁶ the investor commenced proceedings in International Chamber of Commerce seeking compensation for loss suffered in the venture. Kinangop Windpark Ltd (KWP) entered into power purchase agreement (PPA) with the Government of Kenya (GOK). KWP had sought support from the government in order to facilitate the implementation of the project and cushion them against anything that could derail the project including a political event. KWP claim that area politicians stirred up opposition towards the project which led to several demonstrations against the project and investors. KWP argued that it relied upon GOK to remedy the political event while GOK argued that it did its best to reconcile KWP with the local community with no success. This was because matters in question were related to land rights which KWP had not addressed.⁷

GOK argument was that KWP was unable lawfully to implement and carry out the wind farm project and had failed to undertake an Environmental Impact Assessment as required by law. GOK further pleaded that the Kinangop's claim was founded on its own breach of statutory duty, disregard of the Constitutional rights of Kenyan citizens, failure to secure all relevant land rights from the local land owners, and a breach of the duty of good faith. In addition, the GOK advanced the argument that the facts and matters relied upon by KWP did not constitute a Political Event and consequently did not give rise to a compensation event or any legitimate expectation as KWP's loss was caused by its own failures.

The tribunal held that political interference did not frustrate the project and thus the claim was dismissed. The tribunal stated that there was no political event within the meaning of the letter of support.⁸

⁵ Ibid.

⁶ Ibid Note 3.

⁷ Ibid.

⁸ Ibid.

In *Walam Energy vs Republic of Kenya*⁹, the investor commenced arbitration proceedings in International Centre for Settlement of Investment Disputes for cancellation of a geothermal licence. This was after the GOK establishing that the Walam Energy did not have the requisite capacity to explore geothermal resources in Kenya. GOK revoked the license in 2012 after reaching a conclusion that Walam energy had not performed its duties under the license. The claimant claims that the GOK breach it legitimate expectation by cancelling the license.

The idea of protection of investor expectations is not stated directly in most investment treaties. However, it has been identified by several arbitral tribunals as an essential element of fair and equitable treatment standard. Fair and equitable treatment is tied to the concept of legitimate expectation and is an essential element.¹⁰

2. Legitimate expectations of an investor in FET standard

Fair and equitable treatment standard safeguards treatment of investors through shifting times, in heterogeneous societies that have different political organizations.¹¹ States consider fairness and equity as fundamental values of a legal system. FET standard aim to safeguarding a foreign investor against subjective arbitrariness and misuse of power by the authorities.¹² The standard is presumed to reflect a common international level of treatment which parties to a treaty accept as positive law.¹³

What constitutes fair and equitable treatment has been difficult to define and interpret and case law on matter on the standard has been substantial in the last decade. This is because FET standard poses political, ethical and legal problem inherent in investment protection treaties.¹⁴ The challenge is balancing the foreign investor interests with the sovereign right of the host country to regulate and govern its own territory. A wider interpretation of FET standard result in limitation on sovereign power and legislative will of the host state.¹⁵

The development of FET standard has led to alternative means of providing protection in disputes where there are no clear grounds for expropriation. According to Reinisch¹⁶ FET standard is invoked in almost every investor-State arbitration. In order for investors to prove breach of FET standard, core elements must be established. The conduct of the State maybe

⁹ Ibid Note 2.

¹⁰ Schill, S.W. Fair and equitable treatment under investment treaties as an embodiment of the rule of law. *Transnational Dispute Management (TDM)*, 3(5): 115-14, 2006.

¹¹ Introduction to the Philosophy of Law", Pound (1922), cited in Knoph (1939) p. 4.

¹² Wouters, Jan and Duquet, Sanderijn and Hachez, Nicolas, *International Investment Law: The Perpetual Search for Consensus* (2012).

¹³ Ibid.

¹⁴ Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 *BRIT. Y.B. INT'L L.* 99 (1999).

¹⁵ Ibid.

¹⁶ Reinisch A., *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) p 2.

“arbitrary, unjust, idiosyncratic, discriminatory and exposes the investor to sectional prejudice or involve lack of due process leading an outcome which offends judicial propriety.”¹⁷ In applying the FET standard, the treatment must be in breach of representation made by host State which were relied on by the foreign investor.

The article will mainly focus on protection of legitimate expectation of an investor. Legitimate expectation of an investor is defined in *Thunderbird* case as follows;

*“A situation where a contracting party conduct create reasonable and justifiable expectation on part of the investor to act in reliance on said conduct, such that failure by party to honour those expectations could cause the investor to suffer damage.”*¹⁸

The extent of the concept of legitimate expectation is not clear and its content varies in arbitral practice. The ambiguity is created by the fact that legitimate expectation is interrelated with other elements of FET such as arbitrariness, due process and transparency.¹⁹

There are scholars who support the idea that legitimate expectations arise at the time the investors are planning to invest in a host State. In *Duke Energy v Ecuador* the tribunal provided that legitimate expectation cannot arise at a later point of time other than the investor entry to the host State.²⁰ According to Schreuer & Kriebaum²¹, most international investment involve complex operations and therefore it is not possible to restrict creation of legitimate expectations at initial stage, but rather they should be considered at every stage when a decisive step is taken by the investor.²² Therefore, the legal framework existing when the investor is making the decision to invest is important in creating legitimate expectations.

An investment is an economic project that requires a colossal amount of money and time. Due to longevity of the project, changes may occur that affect the investment. There are changes that relates to actions of a host State that affects investors. The changes may dependent on political and economic environment of the host State.

¹⁷ Waste Management Inc v. United Mexican states. Award, 30 April 2004.

¹⁸ International Thunderbird Gaming Corporation v. The United Mexican States, Award of 26 January 2006, UNCITRAL Case, para 147.

¹⁹ Schreuer, Christoph: “Fair and Equitable Treatment in Arbitral Practice”. Journal of World Investment and Trade, vol 7 (2005) pp.357-386.

²⁰ *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19.

²¹ Schreuer, Christoph and Kriebaum, Ursula. At What Time Must Legitimate Expectations Exist? In: Werner, Jacques; Ali, Arif Hyder (eds.), *A Liber Amicorum: Thomas Walde - Law Beyond Conventional Thoughts* [online]. CMP Publishing, 2009, p. 265-276.

²² *Ibid.*

Investors are required to obey the laws of the host State. In addition, long term projects require agreement between the investor and host State outlining the gaps and limits of interferences in agreements rights. The claim for violation of legitimate expectation is raised in circumstances where the investor claim that host State has breached expectations assured at the beginning of the investment. The question is to what extent does equitable treatment supports legitimate expectations of the investor and which expectations are considered legitimate.

Based on arbitral practice, there are three key elements that must be fulfilled for an investor to claim breach of legitimate expectations:

1. *Specific representations or commitments made to the investors which were relied on;*
2. *The investor is aware of the general regulatory framework in host State; and*
3. *Investors' expectation be balanced against legitimate regulatory activities of host States.*²³

What constitute specific assurances?

In *LG&E v Argentina* the tribunal held that for legitimate expectation of an investor to be established, there must be specific assurances. The tribunal considered the regulatory framework that governed gas industry. In order to attract investors Argentina enacted several laws fixing Argentine peso at par with the USA dollar. Calculation of gas tariffs was in dollars and conversion to pesos at the time of billing. The legal framework was later amended during 2000-2002 economic crisis that negatively affected investors. This resulted in several claims against Argentina. The tribunal concluded that the regulatory framework governing gas industry created specific commitments. The tribunal stated that the regulatory framework was not a general legislation since it was designed to regulate foreign investors. Therefore, it was not a general law since it affected all investors in terms of fixing tariffs.²⁴

This informs the need to differentiate between legitimate expectations created by specific assurances and those created by general regulatory framework. If there are specific assurances generated by general legal framework, legislative expectations only have marginal scope of application.²⁵ According to Schill, protection arising from general regulatory framework will only apply when newly introduced law is retroactive. In *Parkerings v Lithuania*, it was held that assurances can be explicit in form of promise or implicit when the "State make assurances that the investors took into account in making the investment."²⁶

²³ UNCTAD. Fair and equitable treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations: New York and Geneva, 2012. P. 68.

²⁴ Ibid.

²⁵ Schill, S. W. Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, International Law and Justice Working Papers. New York University Law School, Global Administrative Law Series, 2006 vol. VI. p. 32.

²⁶ *Parkerings-Compagniet AS v. Lithuania (Parkerings v Lithuania)*, ICSID Case No. ARB/05/8, para 331 217.

Therefore, legitimate expectations can arise only for specific assurances offered by the host State. Further, regulatory framework can be accounted for as specific assurances only if there is a specific connection to the investment. For example, when a host State provide investors with benefits without which the investor would not have invested in the host State.

What constitutes investor general awareness of regulatory framework in host State?

Investors should take into account business risks and regulatory framework in their area of investment. This indicates connection between reasonableness and due diligence on the part of the investors.²⁷ In *Duke Energy v Ecuador* case²⁸, the tribunal pointed out that expectations of the investors must be reasonable and legitimate. Therefore, all circumstances must be taken into account when assessing reasonableness including “*political, social economic and cultural conditions of the host State.*”²⁹

In specific areas of law, investors need to be considerate and foresee possible changes in legislation based on external factors. The investors ought to be familiar with connected area of law. For example, in environmental law, there exist regulations on use of chemicals that harm the environment. There are multilateral agreements that regulate investment in that filed. In addition, investors consider the stability of the legal environment in the field of investment. In *Methanex* case,³⁰ the investor entered in a regulated environment where restrictions on chemicals were typical. The claimant claim did not succeed against the United States of America (USA). This was informed by the fact that USA did not provide investors with specific assurances that regulation of chemical industry would remain unchanged. The tribunal stated that the ban in California State was non-discriminatory and did not breach legitimate expectations of the investor. It was held that the area of law was constantly being monitored by government authorities to safeguard public interests. Therefore, the changes could have been expected in the legal framework.

Therefore, claims based on breach of legitimate expectation that is connected to the stability of the legal system should not succeed if the regulation was non-discriminatory, reasonable and general.

What constitute due diligence on part of investor in absence of specific assurances from host State?

It is not sufficient for an investor to prove specific assurances. The investor should conduct due diligence in order to estimate the risks involved in the host State. In addition, the investor cannot rely on unlawful and unauthorized assurances. In the case of *Thunderbird v Mexican States*,³¹ it was held that the claimant could not rely on the opinion of the government because he knew that

²⁷ LG&E v Argentina, 2006.

²⁸ Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, para. 340.

²⁹ Ibid.

³⁰ Methanex v United States, 2005.

³¹ Thunderbird v Mexico, 2006, Award, para 148 and 164.

gambling was illegal in Mexico. The investor did not provide correct facts to the host State of the nature of his business when he requested for legal opinion from the government. Therefore, the investor claim for breach of legitimate expectation failed since he did not act in good faith when he provided incorrect information.

In addition, the obligations of investors related to the investments are crucial in evaluating the responsibility of the state in case of breach. The investor is expected to fulfill certain conditions in order to be granted protection under bilateral investment treaties. In *Muchlinski* case,³² it was held that the investor must have good faith and conduct due diligence when making an investment. Investments bear certain level of risk and investments in developing countries require investors to be more careful due to the risks involved.³³

The investor cannot rely on assurances given by host State. Investors should familiarize themselves with the legal framework governing a particular field of investment. Investors cannot rely on the general framework that they encounter when they made the decision to invest in a host State. They need to consider political, economic, social and legal changes that occur in a host State. The principle of good faith should be applied by the investor and any actions that negate the principle are not legally protected.³⁴

2. Broad and Specific approaches to the concept

The broad approach to the concept of legitimate expectations requires that officials of host State to act clearly and without ambiguity in order to ensure that the investor know in advance all regulations and policies to abide to. In the case, *Tecmed S.A. v. The United Mexican States*³⁵, Técnicas Medioambientales Tecmed, S.A. filed a claim alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaty (BIT) between Spain and Mexico. The tribunal examined transparency with predictability of the legal environment of a host State. The tribunal reached the conclusion that Mexican officials had acted in unclear and ambiguous manner and violated legitimate expectations of the investor.³⁶ Therefore, an investor should be informed beforehand of any changes in legal policy of a host State. Further, the public and investors have an obligation to monitor proposed changes of the law and policies that affect their investment.

³² Muchlinski, Peter. 'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard. *International & Comparative Law Quarterly* [online]. 2006, Vol. 55, p. 527-557, at 531 Available at <http://eprints.soas.ac.uk/3466/1/CaveatInvestor.pdf>.

³³ Ibid.

³⁴ A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard [online]. Social Science Research Network Legal Scholarship Network ANU College of Law Research Paper No. 09-01 p. 45-52.

³⁵ Técnicas Medioambientales Tecmed S.A. v. the United Mexican States, ICSID case No ARB(AF)/00/2 (Award) (May 29, 2003).

³⁶ Ibid.

In *Duke Energy v Ecuador*, it was stated that expectations must arise from conditions advanced by host State and the foreign investor must have relied upon them when making the decision to invest.³⁷ However, in *Tecmed* case, there was a shift with regards to extension of legitimate expectations to be considered. The state did not give any direct assurances nor implied assurances in their legal framework. The legitimate expectation of the investor was established since the investors were relying on return of their investment from the landfill which was expected last more than two years.

In *MTD v Chile*, the tribunal arrived at a different conclusion and criticized the decision of *Tecmed* because of reliance on investor expectations as a source of host State obligation. *MTD v Chile* Tribunal stated that “the obligations of the host state towards investors derive from the terms of the applicable investment treaty and not from any set expectations investors may have. A tribunal ought to generate such expectations as a set of rights different from what is contained in the BIT may exceed its powers”.³⁸ The findings of the tribunal criticized the broad approach applied in *Tecmed* case which incorrectly held that legitimate expectation can be based on general regulatory framework. The broad approach is based on un-changeability of policies and regulations of the host country. It provides the investor with inherent right of legitimate expectation unless the host country has a reason to alter its policy. This has brought concerns regarding the role of a State on legislative discretion when faced with economic crisis.

The broad approach bestows greater benefits on the foreign investor than the local economic activities and majority of citizens in the host state. Thus, many have criticized this approach since it fail to appreciate that regulations and policies of a host state may change depending on political and economic environment. Therefore, *Tecmed* case is not at all a standard to be used but rather it is a description of a perfect general rule in a perfect world which all states wish to attain.³⁹

The narrow approach of legitimate expectation of an investor tries to relate to reality on the ground. The approach is more objective and closer to reality. The investor legitimate expectations are formed considering that the governing situations, existing precedent and practical experiences in a host State. This was expressed in *Parkerings v Lithuania*⁴⁰ where the tribunal stated that Lithuania was experiencing political transition. Therefore, the investor should have predicted possibility of change in legitimate system. In such a case, an investor cannot expect that the policies and regulation of the host state would remain unchanged. Therefore, an investor who decides to invest in a country facing political transition accepts the instability as a trading risk

³⁷ *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19.

³⁸ *MTD v Chile*, ICSID Case No. ARB/01/7, Annulment proceedings para 67 213.

³⁹ UNCTAD, Fair and Equitable Treatment, Series on Issues in International Investment Agreements II, 2012, p63.

⁴⁰ *Parkerings-Compagniet AS v. Lithuania (Parkerings v Lithuania)*, ICSID Case No. ARB/05/8, para 331 217.

and is expected to protect his legitimate expectations by having clear treaty conditions that prevent unexpected policy changes.⁴¹

The expectations of the investors are legitimate in case they are logical at the time of establishment of investment in host state. The evaluation of logicability must be done considering all conditions and not only incidents about investments but the political, economic and historical conditions of the host State.

3. The right of Host State to legislate or regulate policy

The broad approach of interpreting the concept of legitimate expectations presupposes that host countries lose their discretion on policy matters and regulatory autonomy. This is because the foreign investor right to predictability of laws and regulations in a host country reign supreme. This has been demonstrated in Argentina cases where the government faced economic crisis.⁴² The executive made policy changes to remedy the situation. Following the executive changes in regulations, the country faced numerous arbitral cases. Investors were disgruntled by the decision of the government and sought protection under BIT. They claimed that there was lack of fairness in policy decisions and breach of legitimate expectations. Argentinian cases raised public concerns because they affected a host state ability to regulate its affairs for public interest.

In *Parkerings v Lithuania*⁴³ case, the tribunal evaluated the investor claim of breach of legitimate expectation due to changes in local regulations. The tribunal held that each state has a right to legislate, modify and cancel local regulation. The right of the state to legislate was considered as a general principal. The investor has a right to protect his legitimate expectation that seem logical after considering all conditions. It was stated that the host State did not guaranteed or act in a manner to provide logical expectation for the investor concerning absences of changes in new policy and regulations. At that time Lithuania was transitioning from Soviet Union to European Union. Therefore, changes in regulations was possible and any expectation based on stability of regulations was illegitimate. The tribunal held that the legitimate space was unpredictable and therefore, the investor should have predicated the possibility of changes in regulations and policies.

The Continental case against Argentina⁴⁴ emphasized that the stability of the regulatory framework in a host State provided for under bilateral treaty does not necessary create legitimate commitment for parties. Arbitral tribunals have acknowledged the right of host State to legislate

⁴¹ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

⁴² *CMS v. Argentina*, Op.cit, para. 274; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260.

⁴³ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 335–336

⁴⁴ *CMS v. Argentina*, Op.cit, para. 274; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260.

on general interests even though the changes in regulations may have some negative effect on the investor.⁴⁵ Therefore, such actions by host state followed by good will cannot be regarded as violation of legitimate expectation of the investor or violation of fair and equitable standard.

4. How to balance the interests of host State and Investor

Arbitral tribunals have emphasized the need to balance investor legitimate expectations against the host state legitimate regulatory goals. The underlying assumption is that fair and equitable treatment standard does not prevent a State from making changes to policies and regulations in public interest despite having negative effect on investment.⁴⁶ The principle of legitimate expectation should be applied in a sense that permit a balance of protection of foreign investors interests and the host State autonomy to enact legislation in public interests. In addition, the principle of consistency and stability should outweigh power of host state to act in public interest.

Proportionality of investors and host state interests play a role in controlling the extent to which the exercise of regulatory power is permissible in interfering with foreign investment under fair and equitable treatment. When we consider what arbitral tribunals identify as reasonable, it does not shed light on what constitute legitimate expectations or consistency in the legal framework of a host State.⁴⁷ Therefore, it is not clear what can be considered reasonable. There are tribunals that are strict in interpretation of what constitute breach of legitimate expectation. They consider consistency and stability as absolute principles which lead to finding of breach of legitimate expectation when host States act in public interest. Such strict interpretation only serves the interest of the investors. A state must be able to adjust in crisis situations and in case where its citizens are at risk.

That is why proportionality should be understood as a specific manifestation of the concept of reasonableness. Reasonableness and proportionality suggest a balance of interest. The concept of reasonableness should be understood as a search for equilibrium in context of disagreement. Proportionality is widely used by tribunals because it provides a set of criteria to judge measures of legality while reasonableness lacks the analytical methodology. Therefore, proportionality test is used to scrutinize reasonableness.

The host state has the right to legislate to protect public interest but the same must be done logically, reasonably and fairly. The goal of treaties is not to protect foreign investors but to help develop the economy of a host country.⁴⁸ Local development require that investors are accorded

⁴⁵ PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007.

⁴⁶ Tudor, I. *The fair and equitable treatment standard in the international law of foreign investment*. Oxford: Oxford University Press, 2008.

⁴⁷ *Ibid.*

⁴⁸ Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010.

preferable treatment and the same be balanced with legitimate right of host country to protect public interest.

5. Conclusion

Legitimate expectation of the investor is one of the elements of fair and equitable treatment that is emphasized in arbitral tribunals. The issue of balancing investor expectations and special needs of the host country to protect the public interest is a growing concern in developing countries. The concept of fair and equitable treatment should not only protect the interest of investors but has to consider the interest of host state and should bring a balance between the interests of the parties.

Investors should take enough time to evaluate the possible risks and adjust their expectations with real conditions in the host country. When investors decide to invest, they have an obligation to examine special prevailing conditions of the host country such as level of democracy, governance practices and development. The reality on the ground is that we cannot expect a state to change its governance practices and regulations because an investor has made an investment. However, the investor can be asked to evaluate the host country with care and make a decision to invest bearing in mind of existing risks.

The article recommends that developing countries should detach themselves from the trappings of the school of thought that lead them to make concession to foreign investors. There is need to rethink the terms and conditions given to investors. The host State should be allowed to have control of development policies without legitimacy of its actions being unnecessarily being challenged by investors.

In addition, developing countries ought to rethink on cost and benefits the dangers of trading off sovereign right to exercise control over all activities within its territory. An appreciation of the issues posed by legitimate expectation of an investor means that developing countries are better placed to clamour for equalitarian terms when engaging foreign investors.

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